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Supreme Court of the United States

OCTOBER TERM, 1964

No. 804

TRANSOCEAN AIR LINES, a corporation; TRANSOCEAN CORPORATION OF CALIFORNIA; ORVIS M. NELSON; and JOHN COSTELLO, as Trustee of the Estate of Transocean Air Lines, a corporation (Bankrupt),
Petitioners,

—against—

IRVING BEN COOPER, United States District Judge For the Southern District of New York,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

(Docket No. 29156)

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Supreme Court of the United States

OCTOBER TERM, 1964

No.

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

(Docket No. 29156)

Petitioners Transocean Air Lines, Transocean Corporation of California, Orvis M. Nelson and John Costello as Trustee of the Estate of Transocean Airlines (Bankrupt), pray that a Writ of Certiorari issue to review the Order of the United States Court of Appeals for the Second Circuit entered in the above entitled case, Docket No. 29156, on October 5, 1964.

Opinion Below

The District Court for the Southern District of New York (*per* Irving Ben Cooper, D. J.) made an order striking Petitioners' demand for trial by

jury, with a memorandum opinion on June 17, 1964, and an order denying amendment thereof on July 15, 1964, by endorsement on the moving papers. The memorandum of June 17, 1964 is unreported and is printed in Appendix B, *infra*.

The proceedings in the District Court are captioned "Transocean Air Lines, a corporation; Transocean Corporation of California; Orvis M. Nelson; and John Costello, as Trustee of the Estate of Transocean Air Lines, a corporation (Bankrupt), Plaintiffs against Pan American World Airways, Inc.; Continental Air Lines, Inc.; The Boeing Company; and Aviation Financial Services, Inc., Defendants" under Docket No. 63 Civil 2845.

The Court of Appeals for the Second Circuit denied Petitioners' Petition for Writ of Mandamus by Order dated October 5, 1964, which is unreported and is printed in Appendix B, *infra*.

Jurisdiction

The Order of the Court of Appeals for the Second Circuit as aforesaid was made and entered October 5, 1964. No Petition for Rehearing was filed. The jurisdiction of this Court is invoked under 28 U.S.C. Sec. 1254(1).

Questions Presented

Petitioners served their Demand for Trial by Jury within ten days of the service by them of their reply to the counterclaims of defendant The Boeing Com-

pany. Respondent has found that such demand was effective only with respect to the counterclaims but was ineffective with respect to two factually related claims contained in the amended complaint. The Order of the Court of Appeals for the Second Circuit denied a Petition for Mandamus to compel Respondent to accord Petitioners a Trial by Jury of certain claims ("Fifth" and "Ninth") of the amended complaint.

1. Under Rule 38(b) of the Federal Rules of Civil Procedure, when read in conjunction with the Seventh Amendment to the United States Constitution, under what circumstances will a counterclaim set up in an answer be effective to keep open the time for demanding a jury trial of a claim in the complaint until ten days after service of the reply to the said answer?

2. In determining what an "issue" is within the meaning of Rule 38(b) of the Federal Rules of Civil Procedure, must Rule 13(a) thereof be considered?

3. If a transaction or occurrence which forms the basis for a counterclaim, is also the basis of a claim in the complaint, is a demand for trial by jury of the claim of the complaint sufficient when served within ten days of the reply to the counterclaim?

Constitutional Provision and Statutes Involved

The Constitutional Provision and Civil Procedure Rules involved are the Seventh Amendment to the United States Constitution and Rules 13(a), 38(b) and 39(b) of the Federal Rules of Civil Procedure, printed in Appendix A, *infra*.

Statement

Pursuant to an order of the United States District Court for the Northern District of California, Southern Division, appointing special counsel and authorizing the institution of this action on behalf of Petitioner John Costello as Trustee of Transocean Air Lines, a corporation (Bankrupt), the original complaint was served on Pan American World Airways, Inc., Continental Airlines, Inc., The Boeing Company (hereinafter sometimes called "Boeing") and Aviation Financial Services, Inc. (hereinafter sometimes called "the defendants") on September 30, 1963.

The time for defendants to serve their answers was extended by stipulations to February 6, 1964. Prior to said date petitioners had served their amended complaint on December 19, 1963.

Boeing served its answer thereto on February 6, 1964. The said answer, at paragraphs 46 through 50, contains a counterclaim against Petitioner Transocean Air Lines (hereinafter sometimes called "TAL") and, at paragraphs 51 through 55, contains a counterclaim against Petitioner Transocean Corporation of California (hereinafter sometimes called "TCC"). Said portions of Boeing's answer are printed in Appendix F, *infra*.

TAL and TCC served their reply, which is printed in Appendix G, *infra* on Boeing on April 9, 1964, pursuant to stipulations extending the time therefor.

Within 10 days thereafter Petitioners served on defendants a demand for trial by jury, printed in Appendix H, *infra*.

Defendants by notice of motion, dated May 12, 1964, moved to strike the said demand for trial by jury.

Boeing's counterclaims seek payment of certain promissory notes made by TAL to the order of Boeing as consideration for the sale by Boeing to TAL of 14 piston-powered airplanes.[1] The transactions giving rise to the making of the said notes, and wherein is to be found the consideration therefor, are the subject of the Fifth and Ninth Claims of petitioners' amended complaint (which are printed in Appendix G, *infra*) since Petitioners allege therein that TAL and TCC were the victims of a conspiracy and were coerced into purchasing the said airplanes in order to have available spare parts for the first four airplanes.

In their reply, Petitioners admit that some amount is due Boeing but deny that the amount set forth in the counterclaims is correct. This denial has reference to the fact that TAL and TCC have no defense to the claim of Boeing for the purchase price of the first four Stratocruisers but serves to place in issue their liability for the purchase price of the remaining ten such aircraft.

In their affidavit and memorandum in support of defendants' motion, petitioners primarily relied upon Rule 38 of the Federal Rules of Civil Procedure as giving them the constitutional right to demand a trial by jury of the Fifth and Ninth Claims inasmuch as such demand had been served within 10 days of service by TAL and TCC of their reply. In view of

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[1] See paragraphs 4 and 10 of Mr. King's affidavit sworn to on May 11, 1964, which is part of the Record certified by the Court of Appeals for the Second Circuit.

their right to a trial by jury of the Fifth and Ninth Claims, petitioners went on to ask the District Court to exercise its discretion under Rule 39 F. R. C. P. and to order a trial by jury as to all the claims set forth in Petitioners' amended complaint.

Respondent in his memorandum and Order, dated June 17, 1964, which is printed in Appendix B hereto, did not reach the question of whether the District Court should exercise its discretion under Rule 39 with respect to Claims 1-4, 6, 7, 8 and 10 since he found that there was no right under Rule 38 to a trial by jury of Claims 5 and 9.

The Petition for Writ of Mandamus, which is printed in Appendix F, *infra* was filed with the Court of Appeals for the Second Circuit on September 9, 1964 and was denied on October 5, 1964. It is from this Order that Petitioners seek review before this Court.

Reasons for Granting the Writ

1. The attempts by the various District Courts to apply Rules 13, 38 and 39 of the Federal Rules of Civil Procedure have resulted in a confused state of the law as to the means to be used in permitting trial by jury of claims (such as the "Fifth" and "Ninth" Claims of Petitioners' Complaint) followed by counterclaims (such as those of Boeing) arising out of the same "transaction or occurrence".

Determination of the subject petition is largely dependent upon the subsidiary determination of what constitutes an "issue" within the meaning of Rule 38(b) of Federal Rules of Civil Procedure.

Professor Moore in his treatise on Federal Practice speaks of two divergent lines of authority in the District Courts as to when a counterclaim holds open a claim of the complaint for purposes of a jury-trial demand and when it does not. 5 *Moore's Federal Practice,* 2d Ed., 314-319.

> The second and divergent line of authority holds that a demand for trial by jury, of the issues raised by the complaint, answer, and reply to defendant's *compulsory* counterclaim set out in its answer is timely if made not later than 10 days after service of the reply.
>
> * * * *
>
> It will be noted that the first line of authority when coupled with its relief from waiver [Rule 39(b) F.R.C.P.], which sound judicial administration prompts *if, indeed, it does not require,* reaches the same end result effected by the second line of authority.
>
> * * * *
>
> But we believe that the second line of authority * * * is preferable. It is more direct. The defendant's *compulsory* counterclaim is a part of defendant's answer, *factually* related to plaintiff's claim, realistically the issues are not formulated until the reply has been served. (*Ibid,* page 316; "compulsory" is in italics in original, other italics supplied).

For an understanding of what a "compulsory" counterclaim is, Professor Moore makes reference to the portions of his treatise dealing with Rule 13 of the Federal Rules of Civil Procedure, *Ibid,* page 317.

Apparently, Respondent took note of the first line of authority, which is dependent on Rule 39(b) F.R. C.P., an otherwise discretionary rule, and has chosen not to exercise the discretion, a holding which is not supported by any of the cases following either line of authority.

In its papers in reply to the Petition for Writ of Mandamus, Boeing contended that its counterclaims were not mandatory since they had been asserted in the bankruptcy proceedings. Of course this position is not available against TAL and TCC and is of questionable validity against Mr. Costello as Trustee of TAL, since the reference to Rule 13, it is submitted, is for its factual test.

2. The opinion of the District Court announced a rule that is not only novel but is also violative of the Seventh Amendment to the United States Constitution.

In denying Petitioners a trial by jury of the Fifth and Ninth Claims, Respondent drew a distinction between counterclaims that are "simple" and claims of a complaint that are "highly complex" although "alleging conduct which might present a real defense to payment of a promissory note".

Accordingly, a further restriction is engrafted on the factually oriented test described by Professor Moore in the quotations, *supra*—unless it is to be assumed that jury trials are now to be permitted of "simple" claims of a complaint where a jury trial is demanded within ten days of service of a reply to an answer containing factually unrelated "simple" counterclaims.

Apparently, Respondent was impressed by defendants' arguments that a "face of the pleadings" or "quasi-parole evidence rule" must be followed in determining whether the Fifth and Ninth Claims of Petitioners' amended complaint, the counterclaims in Boeing's answer and the reply embrace the same issues.

Usually pleadings are so broad that a mere examination of them would reveal similar issues and require a jury trial of the claims of the complaint in circumstances such as those here in question. Accordingly, the courts have found it necessary to define the term "issue" from a factual standpoint rather than from the standpoint of the abstract reasoning and broad generalizations to be expected in most pleadings.

It is submitted that the term "issue" for the purposes of Rule 38(b) should not be the subject of shifting interpretations from case to case, with the reasoning ever different but the result always the same, a denial of trial by jury.

It is further submitted that Petitioners' Reply, although it could have been clearer on the question, is fully sufficient to permit an inquiry into the matters set forth in the Fifth and Ninth Claims of the Amended Complaint at the time the counterclaims are tried before a jury. As set forth in the Statement, *supra,* and recognized by the Respondent in his memorandum, the counterclaims and the Fifth and Ninth Claims arose out of the same transaction or occurrence (See Rule 13, Federal Rules of Civil Procedure).

3. The opinion of the District Court reflects an attitude towards jury trials, common among many of the

District Courts, that unduly restricts application of the Seventh Amendment of the United States Constitution and should be corrected by this Court.

In ordering Mandamus in *Beacon Theatres* v. *Westover,* 359 U. S. 500 (1959) and *Dairy Queen, Inc.* v. *Wood,* 369 U.S. 469 (1962), this Court recognized the necessity to curb attempts by the District Courts unduly to deny jury trials.

Stated simply, the attitude of many District Courts seems to be that wherever possible (except in those cases where the verdict of a jury is deemed to be more convenient and appropriate) and even on the most tenuous grounds, trials by jury today should be denied.

An excellent example of this is found in a case cited by Defendants to the District Court, *McAndrews* v. *United States Lines Company,* 167 F. Supp. 41 (SD NY, 1958). This latter case involved a third-party-plaintiff, which came into a case after the original plaintiff had demanded a trial by jury by endorsement on the original complaint. Later the third-party plaintiff when the case was *already on the jury calendar* was denied a jury trial because the case among the original parties had been disposed of by settlement and because the third-party plaintiff had not itself demanded a jury trial within ten days of service of the answer of the third-party defendant.

In keeping with the prevalent attitude of the District Courts, Respondent stated in his memorandum:

> "The Requirements of these rules are strictly enforced, especially by this court."

It is respectfully submitted that the subject Petition should be granted by this court to permit a full argument of the points raised herein and to enable this Court to complement its opinions in *Beacon Theatres* v. *Westover, supra* and *Dairy Queen, Inc.* v. *Wood, supra,* so that the Court's position with respect to the Seventh Amendment will have been fully enunciated.

Conclusion

For the foregoing reasons, this petition for Writ of Certiorari should be granted.

Respectfully submitted,

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APPENDIX A

United States Constitution

Seventh Amendment:

> In Suits at Common Law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury shall be reexamined in any Court of the United States, than according to the rules of the common law.

Federal Rules of Civil Procedure

RULE 13. COUNTERCLAIM AND CROSS-CLAIM

(a) *Compulsory Counterclaims.* A pleading shall state as a counterclaim any claim which at the time of serving the pleading the pleader has against any opposing party, if it arises out of the transaction or occurrence that is the subject matter of the opposing party's claim and does not require for its adjudication the presence of third parties of whom the court cannot acquire jurisdiction. But the pleader need not state the claim if (1) at the time the action was commenced the claim was the subject of another pending action, or (2) the opposing party brought suit upon his claim by attachment or other process by which the court did not acquire jurisdiction to render a personal judgment on that claim, and the pleader is not stating any counterclaim under this Rule 13.

* * * *

RULE 38. JURY TRIAL OF RIGHT

(a) RIGHT PRESERVED. The right of trial by jury as declared by the Seventh Amendment to the Constitution or as given by a statute of the United States shall be preserved to the parties inviolate.

(b) DEMAND. Any party may demand a trial by jury of any issue triable of right by a jury by serving upon the other parties a demand therefor in writing at any time after the commencement of the action and not later than 10 days after the service of the last pleading directed to such issue. Such demand may be indorsed upon a pleading of the party.

(c) SAME: SPECIFICATION OF ISSUES. In his demand a party may specify the issues which he wishes so tried; otherwise he shall be deemed to have demanded trial by jury for all the issues so triable. If he has demanded trial by jury for only some of the issues, any other party within 10 days after service of the demand or such lesser time as the court may order, may serve a demand for trial by jury of any other or all of the issues of fact in the action.

(d) WAIVER. The failure of a party to serve a demand as required by this rule and to file it as required by Rule 5(d) constitutes a waiver by him of trial by jury. A demand for trial by jury made as herein provided may not be withdrawn without the consent of the parties.

RULE 39. TRIAL BY JURY OR BY THE COURT.

(a) BY JURY. When trial by jury has been demanded as provided in Rule 38, the action shall be designated upon the docket as a jury action. The trial of all issues so demanded shall be by jury, unless (1) the parties or their attorneys of record, by written stipulation filed with the court or by an oral stipulation made in open court and entered in the record, consent to trial by the court sitting without a jury or (2) the court upon motion or of its own initiative finds that a right of trial by jury of some or all of those issues does not exist under the Constitution or statutes of the United States.

(b) BY THE COURT. Issues not demanded for trial by jury as provided in Rule 38 shall be tried by the court; but, notwithstanding the failure of a party to demand a jury in an action in which such a demand might have been made of right, the court in its discretion upon motion may order a trial by a jury of any or all issues.

(c) ADVISORY JURY AND TRIAL BY CONSENT. In all actions not triable of right by a jury the court upon motion or of its own initiative may try any issue with an advisory jury, or, except in actions against the United States when a statute of the United States provides for trial without a jury, the court, with the consent of both parties, may order a trial with a jury whose verdict has the same effect as if trial by jury had been a matter of right.

APPENDIX B

MEMORANDUM

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

63 Civ. 2845

TRANSOCEAN AIR LINES, a corporation; TRANSOCEAN CORPORATION OF CALIFORNIA; ORVIS M. NELSON; JOHN COSTELLO, AS TRUSTEE OF THE ESTATE OF TRANSOCEAN AIR LINES, a corporation (BANKRUPT),

Plaintiffs,

—against—

PAN AMERICAN WORLD AIRWAYS, INC., CONTINENTAL AIRLINES, INC., THE BOEING COMPANY and AVIATION FINANCIAL SERVICES, INC.,

Defendants.

COOPER, *D. J.*

Defendants move to strike the jury demand served by plaintiffs insofar as it purports to apply to issues framed by the complaint and the answers interposed.

The amended complaint was served December 19, 1963 and the last answer, that of defendant Boeing, was served on February 6, 1964. The latter contained two counterclaims. Plaintiffs' reply thereto was served on April 9, 1964. The jury demand in question was filed April 13, 1964.

The complaint, some 38 pages long, charges monopolization and restraint of trade in portions of the air transportation industry. It contains 10 claims, 5 seeking treble damages under the Sherman Act and 5 based upon common law theories of breach of contract and unfair competition.

Plaintiffs claim that the issues framed by the counterclaims and reply (to which the jury demand is concededly timely) are inextricably interwoven with two claims of the complaint against Boeing. It therefore requests this Court to exercise its discretion and permit a jury trial as to all the issues of the case. F.R. Civ. P. 39(b).

The Fifth claim set out in the complaint alleges that plaintiffs, in 1958, purchased four Stratocruiser aircraft from defendant Boeing; that Boeing conspired with The Babb Company, Inc. (not a defendant here) to prevent plaintiffs from obtaining spare parts for its aircraft; that because of this conspiracy, plaintiffs were forced to purchase 10 additional Stratocruiser aircraft from Boeing, with the understanding that four of them would be used for spare parts for the remaining planes.

By reason of these contentions, plaintiffs allege that defendant Boeing is guilty of engaging in a combination and conspiracy to restrain interstate and foreign commerce in violation of Section 1 of the Sherman Act; and of a conspiracy to monopolize a segment of interstate and foreign commerce in violation of Section 2 of the Sherman Act.

The Ninth claim alleges the same acts of Boeing, and charges that they constitute slander of property, malicious interference with business relations and unfair competition.

The counterclaim of Boeing alleges nonpayment by plaintiffs of three promissory notes and a small amount for spare parts and services, totalling $4,510,548.74.

The reply generally denies the counterclaims, except admits that some amount is due to Boeing.

Rule 38(b) of the F.R. Civ. P. provides that a demand for a jury trial must be served "not later than 10 days after the service of the last pleading directed to such issue." Failure to comply with this rule constitutes a waiver of trial by jury. F.R. Civ. P. 38(d).

The requirements of these rules are strictly enforced, especially by this Court, *Goldblatt* v. *Inch*, 203 F.2d 79 (2d Cir. 1953); *Gottesman* v. *Texas Petroleum Co.*, 26 F.R.D. 623 (S.D.N.Y. 1961); *Mason* v. *British Overseas Airways Corp.*, 20 F.R.D. 213 (S.D.N.Y. 1957), and a waiver from this default, pursuant to Rule 39, will not be granted, "except under highly exceptional circumstances . . ." *Second—79th St. Co.* v. *United States Steel Corp.*, 22 F.R.D. 98, 99 (S.D.N.Y. 1958). There is no longer any occasion to indulge any presumption against waiver. 5 Moore's *Federal Practice* pps. 334-335.

Where the issues raised by the counterclaim and reply are essentially similar to those in the complaint, a jury demand, timely as to the former but not the latter, will extend to all the issues in the case. *Binger* v. *Unger*, 7 F.R.D. 121 (S.D.N.Y. 1946); *Goldblatt* v. *Inch*, *supra*.

Here, the issue of non-payment raised by the counterclaim is quite simple, and presents no complex factual situation to the trier of the facts.

The Fifth and Ninth claims in the complaint, while alleging conduct which might present a real defense to

payment of a promissory note, are highly complex, involving issues not even remotely connected with those presented by the counterclaim and reply. *Goldblatt* v. *Inch, supra.*

Indeed, in an anti-trust suit of this nature, fair and efficient administration of justice dictate that relief from the waiver be denied.

Accordingly, the motion is granted.

The foregoing shall be considered an order; no settlement thereof is necessary.

So Ordered:

New York, N.Y.
June 17, 1964

Irving Ben Cooper
U. S. D. J.

APPENDIX C

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 29156

TRANSOCEAN AIR LINES, a corporation; TRANSOCEAN CORPORATION OF CALIFORNIA; ORVIS M. NELSON; JOHN COSTELLO, AS TRUSTEE OF THE ESTATE OF TRANSOCEAN AIR LINES, a corporation, (BANKRUPT),

Petitioners,

—against—

IRVING BEN COOPER, UNITED STATES DISTRICT JUDGE FOR THE SOUTHERN DISTRICT OF NEW YORK,

Respondent.

[DISTRICT COURT TITLE]

PETITION FOR WRIT OF MANDAMUS TO HONORABLE IRVING BEN COOPER, UNITED STATES DISTRICT JUDGE, SOUTHERN DISTRICT OF NEW YORK, AND FOR OTHER RELIEF

To the Honorable Judges of the United States Court of Appeals for the Second Circuit:

The petition of Transocean Air Lines, a corporation, Transocean Corporation of California, Orvis M. Nelson, and John Costello, as Trustee of the Estate of

Transocean Air Lines, a corporation, (Bankrupt) respectfully shows:

1. Petitioners served their original complaint on Pan American World Airways, Inc., Continental Airlines, Inc., The Boeing Company and Aviation Financial Services, Inc. (hereinafter sometimes called "defendants") on September 30, 1963.

2. The time for defendants to serve their answers was extended by stipulations to February 6, 1964. Prior to said date petitioners served their amended complaint (a copy of which is annexed hereto as Exhibit A) on December 19, 1963.

3. The Boeing Company (hereinafter sometimes called "Boeing") served its answer (a copy of which is annexed hereto as Exhibit B) on February 6, 1964. The said answer, at paragraphs 46 through 50, contains a counterclaim against petitioner Transocean Air Lines (hereinafter sometimes called "TAL") and, at paragraphs 51 through 55, contains a counterclaim against petitioner Transocean Corporation of California (hereinafter sometimes called "TCC").

4. TAL and TCC served their reply (a copy of which is annexed hereto as Exhibit C) on Boeing on April 9, 1964, pursuant to stipulations extending the time therefor.

5. Petitioners served on defendants a demand for trial by jury (a copy of which is annexed hereto as Exhibit D) on April 13, 1964.

6. Defendants by Notice of Motion, dated May 12,

1964 moved to strike the said demand for trial by jury.

7. Boeing's counterclaims seek payment of certain promissory notes made by TAL to the order of Boeing. The transactions giving rise to the making of the said notes, and wherein is to be found the consideration therefor, are the subject of the Fifth and Ninth Claims of petitioners' amended complaint.

8. In its affidavit and memorandum in reply to defendants' motion, petitioners primarily relied upon Rule 38 of the Federal Rules of Civil Procedure as giving them the constitutional right to demand a trial by jury of the Fifth and Ninth Claims inasmuch as such demand had been served within 10 days of service by TAL and TCC of their reply.

9. In view of their right to a trial by jury of the Fifth and Ninth Claims, petitioners went on to ask the District Court to exercise its discretion under Rule 39 F.R.C.P. and to order a trial by jury as to all the claims set forth in petitioners' amended complaint.

10. Judge Cooper in his Memorandum and Order, dated June 17, 1964 (a copy of which is annexed hereto as Exhibit E) did not reach the question of whether the Court should exercise its discretion under Rule 39 with respect to Claims 1-4, 6, 7, 8, and 10 since he found that there was no right under Rule 38 to a trial by jury of Claims 5 and 9.

11. By Notice of Motion dated July 15, 1964, petitioners prayed that Judge Cooper amend his Memo-

randum (Exhibit E) to include the certification provided for in 28 U.S.C. § 1292 (b). He denied the said motion, by endorsement on the moving papers, on August 10, 1964.

12. This petition, it is respectfully submitted, merits careful consideration by the Court for many reasons, including the following:

(a) the attempts by the various District Courts to apply the Federal Rules of Civil Procedure, Rules 13, 38 and 39, have resulted in a confused state of the law as to the means to be used in allowing trials by jury of claims, (such as 5 and 9 of the amended complaint) followed by compulsory counterclaims (such as those of Boeing)—a confusion which unfortunately has not been the subject of any extensive opinions by any of the Courts of Appeals or the Supreme Court;

(b) what reasoning has been expressed up to now by the various District Courts in their brief opinions, although differing as to the means (Rules 38 or 39 F.R.C.P.) has consistently reached the result that a demand for trial by jury served within ten days of a reply to a counterclaim, which had as its basis the transaction or occurrence giving rise to a claim in the complaint, is timely as to that claim of the complaint.

13. Petitioners in seeking the mandate of this Court invoke the Seventh Amendment to the United States Constitution.

14. Boeing included the counterclaims in its answer, not voluntarily but because of the compulsion of Rule 13 of the Federal Rules of Civil Procedure. Furthermore, it is respectfully submitted that Rule 13 must be read in conjunction with Rule 38 and provides the reason why the latter rule does not simply say that a jury-trial demand must be served not later than 10 days after the answer.

15. In the last paragraph of page 2 of the memorandum of the lower court, its language is tantamount to an expression of a rule of *strictissimi juris* with respect not only to Rule 39 but also with respect to Rule 38. Any application of *strictissimi juris* to Rule 38 would, of course, be violative of the Seventh Amendment to the United States Constitution and the decisions of the United States Supreme Court.

16. Furthermore, even with respect to Rule 39, if the District Courts should foreclose entire classes of actions at law (such as anti-trust cases) from its relief provisions, the extreme shortness of the time limitation in Rule 38 would lose its principal justification and the entire Rule would be subject to attack as being violative of the Constitution.

17. Petitioners cannot escape the conclusion that the paramount consideration, albeit unconscious, in the rendition of the lower court decision was the taking advantage of the opportunity to simplify the eventual trial of the subject action.

18. Based on the foregoing, it is respectfully submitted that petitioners, as a matter of right, accruing under Rule 38 F.R.C.P. considered in conjunction

with Rule 13 thereof, are entitled to a trial by jury of the Fifth and Ninth Claims of the Complaint.

WHEREFORE, the petitioners pray:

(1) That an order be issued to said Honorable Irving Ben Cooper, Judge of the United States District Court for the Southern District of New York, requiring him to show cause in this Court at a time to be designated, why he should not vacate so much of Order of June 17, 1964 as denies to petitioners a trial by jury of the Fifth and Ninth Claims of the Amended Complaints and include therein a paragraph specifically providing for such trial of such claims.

(2) That a mandate be issued to said Honorable Irving Ben Cooper, directing him to vacate so much of Order of June 17, 1964 as denies to petitioners a trial by jury of the Fifth and Ninth Claims of the Amended Complaints and include therein a paragraph specifically providing for such trial of such claims.

(3) That petitioners have such other and further relief and process as may be necessary and appropriate in the premises.

Respectfully submitted,

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[Verification]

APPENDIX D

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

[COURT OF APPEALS TITLE]

PETITION FOR A WRIT OF MANDAMUS

JOY, HALLINAN AND FINN,
New York, N. Y.,
for petitioners.

Petition denied.

J. E. L.

L. P. M.

J. J. S.
U.S.C.JJ.

5 October 1964

APPENDIX E

Fifth and Ninth Claims of Petitioners Amended Complaint:

FIFTH CLAIM

I

NATURE OF CLAIM AND JURISDICTION OF COURT

106. This claim is asserted against defendant Boeing under Sections 4 and 12 of the Clayton Act in order to recover damages resulting from the violation by defendant Boeing of Sections 1 and 2 of the Sherman Act.

II

DESCRIPTION OF PARTIES

107. Paragraphs 7, 8, 9, 10, 11, and 13 are realleged as if fully set forth herein.

108. The Babb Company, Inc. (hereinafter sometimes called "Babb"), during the time of the matters hereinafter complained of, was either a subsidiary of, or under the control of, the Atlas Corporation.

III

COMMERCE INVOLVED

109. Paragraphs 16, 17, and 18 are realleged as if fully set forth herein.

110. During 1958 and 1959, Boeing was a substantial manufacturer and dealer in piston-powered aircraft in the United States both because of its manufacture of such planes and also because of its resale of used piston aircraft received by it, in partial payment for jet-powered airliners.

111. The Babb Company, Inc. maintained piston-powered aircraft and supplied spare parts for such aircraft during 1958 and 1959.

IV

The Offenses Charged

112. Beginning in or about 1958 and continuing through 1959, defendant Boeing and the co-conspirator Babb and other persons acting for each of them and in concert with each other and in furtherance of an unlawful conspiracy were engaged in:

(a) A combination and conspiracy to restrain inter-state and foreign commerce of the United States in violation of Section 1 of the Sherman Act;

(b) A combination and conspiracy to restrain inter-state and foreign commerce of the United States by preventing TAL from obtaining spare parts from any source for certain Stratocruiser piston-powered aircraft purchased from Boeing in order that TAL be compelled to purchase additional aircraft of the same type from Boeing and in order that TAL not purchase piston-powered aircraft from any other source;

(c) A combination and conspiracy to monopolize a substantial segment of the inter-state and foreign commerce of the United States in violation of Section 2 of the Sherman Act.

113. Each act of the defendant Boeing and the co-conspirator Babb, hereinafter alleged, was done in furtherance of the offenses charged in the preceding paragraph, was a part thereof and was done with the primary purpose of restraining the trade and commerce described above. It was the intent of defendant Boeing and the co-conspirator Babb, *inter alia*:

(a) That TAL be prevented from obtaining spare parts for four (4) piston-powered Stratocruisers purchased from Boeing;

(b) That TAL be forced to purchase additional aircraft of the same type from Boeing, some of which would be cannibalized for spare parts.

V

TAL's Purchase of Stratocruisers From Boeing

114. In June, 1958, TAL agreed in writing to purchase from Boeing four (4) Stratocruisers which Boeing had taken as part payment for jet aircraft being purchased from it by the British Overseas Aircraft Corporation (hereinafter sometimes called "BOAC"). With the assistance of TAL, Babb thereafter entered into an agreement with BOAC for the exclusive right to sell its spare parts for the Stratocruisers.

115. A close personal relationship between an officer of Babb and an officer of Boeing thereafter caused Babb to refuse to sell any of the spare parts to TAL. The purpose of this refusal was to force TAL to purchase ten additional Stratocruisers from Boeing with the understanding that four of the ten (10) aircraft could be cannibalized for spare parts. Accordingly, TAL reluctantly agreed to make the additional purchase.

VI

Effects of Offenses

116. Plaintiffs TAL and TCC have been immediately injured as a result of the offenses alleged above:

(a) By TAL's being unable to purchase spare parts for the said aircraft;

(b) By being forced to purchase additional piston-powered aircraft, a majority of which were unwanted by TAL, from Boeing;

(c) By being unable to purchase additional piston-powered aircraft from any seller other than Boeing.

117. As a result of the offenses hereinabove alleged and as a consequence of the injuries sustained by the plaintiffs:

(a) Competition among United States Flag air carriers of passengers and freight between the Pacific Coast and Hawaii and generally upon the Pacific has been restrained and monopolized;

(b) Competition among sellers of piston-powered aircraft and spare parts for such aircraft to be used in the commerce referred to in the preceding subparagraph has been restrained and monopolized.

118. As a result of the foregoing (a) TAL has been injured in its business and property in an amount estimated to be in excess of $3,000,000 or which when trebled in accordance with Section 4 of the Clayton Act equals in excess of $9,000,000; and (b) TCC has been injured in its business and property in an amount estimated to be in excess of $1,750,000 or which when trebled in accordance with Section 4 of the Clayton Act equals in excess of $5,250,000.

* * * *

NINTH CLAIM

I

Nature of Claim and Jurisdiction of Parties

136. This claim is asserted by plaintiffs TAL and TCC against defendant Boeing to recover damages sustained as a result of the slander of property or malicious interference with business relations and similar acts of unfair competition. TAL and TCC are California corporations, whose principal offices are in their state of incorporation, while Boeing is a Delaware corporation, which maintains its principal office in the State of Washington and which also maintains an office in the City, County and State of New York. The matter in controversy exceeds, exclusive of interest and costs, the sum of $10,000.

II

Description of Parties

137. Paragraphs 7, 8, 9, 10, 11 and 13 are realleged as if fully set forth herein.

III

Acts Committed

138. From and after the year 1958 and without legal justification defendant Boeing has slandered the property, maliciously and wilfully injured the business relations of TAL and TCC, and has accomplished similar acts of unfair competition by the acts alleged in Paragraphs 46 to 64 inclusive and 114 to 115, which paragraphs are realleged as if fully set forth herein.

IV

Effects of Acts

139. TAL and TCC have been injured in the manner hereinbefore alleged in Paragraphs 68, 69, 71, 116 and 117, which paragraphs are realleged as if fully set forth herein.

140. As a result of the foregoing: (a) TAL has been injured in its business and property in an amount estimated to be in excess of $10,000,000; and (b) TCC has been injured in its business and property in an amount estimated to be in excess of $5,000,000.

* * * *

APPENDIX F

Boeing's Counterclaims:

* * * *

DEFENDANT BOEING FOR A FIRST COUNTERCLAIM AGAINST TAL ALLEGES:

46. For good and valuable consideration, plaintiff TAL executed certain installment promissory notes to defendant Boeing as follows:

Notes	Effective Dates	Aggregate Principal Amounts
14 Series "A" Notes	July 14, 1958 to August 3, 1959	$4,271,440.00
21 Series "B" Notes	July 14, 1958 to January 8, 1959	678,042.08
1 Series "C" Note	September 1, 1959	68,107.38

47. Plaintiff TAL has not paid some or all installments of principal and interest due under said notes on the due dates thereof or thereafter to date, which unpaid principal balance and some interest thereon totals $4,963,724.62, although payment thereof has been demanded.

48. Plaintiff TAL is further indebted to defendant Boeing in the amount of $46,824.12, which indebtedness represents Boeing claims against TAL for spare parts, a downpayment on one B-377 aircraft, and services rendered TAL by Boeing personnel.

49. Plaintiff TAL was adjudicated a bankrupt on October 16, 1962 in the United States District Court

for the Northern District of California, Southern Division, Bankruptcy No. 58240.

50. Defendant Boeing has duly filed and proved its claim for $4,51[illegible]48.74 plus interest for the unpaid principal bala[illegible]es and interest under said unpaid notes, and th[illegible] expenses incurred by Boeing in behalf of TAL stated in paragraph 48 of this answer, less an agreed credit to TAL of $500,000.00. Said claim has been fully allowed by the court.

DEFENDANT BOEING FOR A SECOND COUNTERCLAIM AGAINST TCC ALLEGES:

51. Repeats and realleges paragraphs 46, 47, 49 and 50 hereof.

52. For valuable consideration plaintiff TCC agreed in writing to be jointly and severally liable as maker of said notes.

53. No payment has been made by TCC on said notes although payment has been demanded.

54. On or about June 18, 1963 plaintiff TCC filed a petition under Chapter XI of the Bankruptcy Act in the United States District Court for the Northern District of California, Southern Division, Bankruptcy No. 73705.

55. Defendant Boeing has duly filed and proved the claim stated herein against TCC in the aforesaid Chapter XI proceeding.

* * * *

APPENDIX G

REPLY

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

[DISTRICT COURT TITLE]

Plaintiffs Transocean Air Lines and Transocean Corporation of California, by their attorneys, Joy, Hallinan and Finn, for their Reply to the Counterclaims of Defendant The Boeing Company, allege and set forth as follows:

REPLY OF PLAINTIFF TRANSOCEAN AIR LINES, A CORPORATION, TO THE FIRST COUNTERCLAIM OF DEFENDANT, THE BOEING COMPANY

1. Transocean Air Lines, a corporation (hereinafter sometimes called "TAL") denies each and every allegation contained in paragraph 47 of the Answer of Defendant The Boeing Company (hereinafter sometimes called "Boeing") except that TAL admits that some amount together with interest is due Boeing and further admits that Boeing has made demands for payment at various times since January 1, 1960 of various amounts alleged by it to be due on the notes listed in paragraph 46 of its answer.

2. TAL denies each and every allegation contained in paragraph 48 of Boeing's Answer.

3. TAL denies the allegation contained in paragraph 50 of Boeing's claim in the amount of $4,510,548.74 has been fully allowed by the United States

District Court for the Northern District of California, Southern Division and alleges that such claim is still subject to a motion to expunge.

REPLY OF PLAINTIFF TRANSOCEAN CORPORATION OF CALIFORNIA TO THE SECOND COUNTERCLAIM OF DEFENDANT, THE BOEING COMPANY

4. With respect to paragraph 51 of Boeing's Answer, Transocean Corporation of California realleges paragraphs "1", "2" and "3" hereof as if fully set forth herein and as if the same had been originally alleged by it.

WHEREFORE, Plaintiffs Transocean Air Lines, a corporation, and Transocean Corporation of California demand judgment against Defendant The Boeing Company:

(a) for the relief prayed for in the Complaint herein; and

(b) dismissing the Counterclaims.

Dated: New York, New York
April 9, 1964

JOY, HALLINAN and FINN
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Hayward, California

APPENDIX H

DEMAND FOR TRIAL BY JURY

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

[DISTRICT COURT TITLE]

Sirs:

PLEASE TAKE NOTICE that the plaintiffs herein hereby demand a trial by jury of all issues raised by the Complaint, Answer and Reply herein.

Dated: New York, New York
April 13, 1964.

Yours, etc.,

JOY, HALLINAN and FINN
By James V. Joy, Jr.
A Member of the Firm
Attorneys for Plaintiffs
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New York 17, New York

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762-197—65

In the Supreme Court of the United States

OCTOBER TERM, 1964

No. 804

TRANSOCEAN AIR LINES, A CORPORATION; TRANSOCEAN CORPORATION OF CALIFORNIA; ORVIS M. NELSON; AND JOHN COSTELLO, AS TRUSTEE OF THE ESTATE OF TRANSOCEAN AIR LINES, A CORPORATION (BANKRUPT), PETITIONERS

v.

IRVING BEN COOPER, UNITED STATES DISTRICT JUDGE FOR THE SOUTHERN DISTRICT OF NEW YORK

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The court of appeals filed no opinion in denying the petition for a writ of mandamus. The memorandum opinion of the district court (Pet. B1–B4) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on October 5, 1964 (Pet. D1). The petition for a writ of certiorari was filed on January 4, 1965. The

jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

The Federal Rules of Civil Procedure require that a demand for jury trial "of any issue triable of right by a jury" be served "not later than 10 days after the service of the last pleading directed to such issue," and provide that any demand for jury trial not timely served is waived. Plaintiffs (petitioners) filed a demand for a jury trial as of right on two claims (numbers five and nine) of an amended complaint. The demand was filed more than 10 days after service of defendants' answers to the amended complaint, but within 10 days of plaintiffs' reply to the counterclaims of one defendant.

The question presented is whether the district court correctly ruled, upon an analysis of all of the pleadings, that plaintiffs' reply to the counterclaims was not a pleading "directed to [the] issue[s]" raised in the fifth and ninth claims of the amended complaint and that plaintiffs' jury demand was therefore untimely as to those claims.

RULES INVOLVED

Rules 38 and 39 of the Federal Rules of Civil Procedure are set forth in the petition at pp. A2–A3.

STATEMENT

Petitioners (plaintiffs)[1] seek a writ of certiorari to review a unanimous decision of the Second Circuit

[1] The two corporate petitioners, Transocean Air Lines and Transocean Corporation of California, are referred to as TAL and TCC, respectively.

denying, without opinion, a petition for a writ of mandamus against District Judge Cooper. Judge Cooper, on June 17, 1964, had granted defendants' motion, pursuant to Rule 38(d) of the Federal Rules of Civil Procedure, to strike as untimely part of petitioners' demand for a jury trial. The pertinent facts are as follows:

Petitioners' amended complaint, served on December 19, 1963 (Pet. 4), charged four defendants [2] with monopolization and restraint of trade in the air transportation industry. The allegations were embodied in ten claims, five seeking treble damages for alleged violations of the Sherman Act and five based upon common law theories, including breach of contract, inducement of breach of contract and unfair competition. Damages in excess of $200,000,000 are sought.

The answers of the various defendants, denying the allegations of wrongdoing and asserting certain affirmative defenses, were served by Continental, Pan American and Aviation Financial Services on February 3, 1964, and by Boeing on February 6, 1964 (see Pet. 4). Defendants Continental, Pan American and Aviation Financial Services asserted no counterclaims; so far as these three parties are concerned, there were no pleadings subsequent to the answers. The answer of the fourth defendant, Boeing, asserted two counterclaims—one against each corporate plaintiff. Those counterclaims (Pet. F1–F2) were based

[2] Defendants in the district court are Continental Air Lines, Inc. ("Continental"), Pan American World Airways, Inc. ("Pan American"), Aviation Financial Services, Inc., and The Boeing Company ("Boeing").

on certain promissory notes and a small additional indebtedness arising from the sale of spare parts and from services rendered.

TAL and TCC's reply (Pet. G1–G2) to the Boeing counterclaims was served on April 9, 1964. Their jury demand was served on all defendants on April 13, 1964 (Pet. H1). Petitioners thus served the jury demand within 10 days of their reply to the counterclaims of defendant Boeing, but more than two months after all defendants (including Boeing) had served their answers.

Defendants thereupon moved to have the jury demand stricken in part, *i.e.*, insofar as it related to the issues raised in the amended complaint. The demand for jury trial of the issues raised by the counterclaims was not opposed. Petitioners urged that as to the issues raised by the fifth and ninth claims of the amended complaint they were entitled to jury trial as of right under Rule 38(b), contending that those claims related to the counterclaims and reply. They also requested the district court to exercise its discretion under Rule 39(b) to permit a jury trial on all other claims as well.

Judge Cooper held that petitioners' reply (the only pleading served within ten days prior to the jury demand) could not be considered a pleading directed to the issues presented by the fifth and ninth claims. Those claims, he concluded, involved issues "not even remotely connected with those presented by the coun-

terclaim and reply" (Pet. B4). Moreover, he found no reason to exercise his discretion so as to relieve petitioners of the effect of their failure to serve a timely jury demand (Pet. B3).

Proceeding in the court of appeals by petition for a writ of mandamus, petitioners sought to vacate "so much of [Judge Cooper's] Order of June 17, 1964 as denies to petitioners a trial by jury of the Fifth and Ninth Claims of the Amended Complaint" (Pet. C6). On October 5, 1964, that court (Lumbard, Chief Judge, and Moore and Smith, Circuit Judges) entered an order denying the petition (Pet. D1).

ARGUMENT

We note at the outset, in order to avoid any confusion, that this is a purely private litigation in which the United States is in no way involved. The Solicitor General appears on this brief as counsel to the respondent District Judge upon his request.

It is submitted, on his behalf, that the petition should be denied. The challenged ruling turns solely upon an analysis of the particular pleadings. It enunciates no novel or questionable legal standard. There was no occasion for intervention by extraordinary writ and there certainly is none for further review.

Rule 38(b) of the Federal Rules of Civil Procedure provides that a demand for "a trial by jury of any issue triable of right by a jury" must be served "not later than 10 days after the service of the last plead-

ing directed to such issue." The district court stated (Pet. B3):

> Where the issues raised by the counterclaim and reply are essentially similar to those in the complaint, a jury demand, timely as to the former but not the latter, will extend to all the issues in the case.

It found, however, that the factual issues in the fifth and ninth claims of the amended complaint were "not even remotely connected with those presented by the counterclaim and reply" (Pet. B4). Both this determination and the resulting conclusion that the demand for jury trial was untimely are clearly correct.

(*a*) The fifth claim[3] charged Boeing with violations of Sections 1 and 2 of the Sherman Act. It alleged that TAL agreed to purchase from Boeing four piston-engine aircraft called "stratocruisers", which Boeing had obtained from British Overseas Airways Corporation; that TAL thereafter assisted The Babb Company in entering into an exclusive agreement with British Overseas whereby Babb would sell for British Overseas certain spare parts for stratocruisers; that Babb refused to sell any of those spare parts to TAL; and that the purpose of this refusal was to force TAL to purchase ten additional stratocruisers from Boeing, four of which were to be cannibalized for spare parts. As a result of the alleged conspiracy between Boeing and Babb, it was charged that competition among United States flag air carriers in the Pacific

[3] That claim is contained in paragraphs 106–118 of the amended complaint (Pet. E1–E5).

and competition among sellers of piston aircraft and spare parts have been restrained and monopolized. Treble damages in excess of $14,000,000 were requested.

The ninth claim[4] was based upon common law theories of slander of property, malicious interference with business relations and unfair competition. The claim restated the above charge of conspiracy between Boeing and Babb. It then charged that Boeing and Pan American conspired to have Boeing abrogate a contract to sell TAL three jet aircraft; that Boeing, Pan American and Continental conspired with the result that Japan Air Lines breached an agreement to lease jet aircraft from TAL and negotiated to lease jets from Continental instead; and that Pan American, Boeing and Aviation Financial Services conspired to prevent TAL from obtaining financing during the period shortly before TAL suspended operations. As a result of the above activities, TAL asserted, it failed to receive military air transportation service contracts; did not obtain a certificate from the Civil Aeronautics Board to provide unrestricted air carriage over the Pacific; suffered the cancellation of its supplemental certificate; and was forced to suspend flying operations. Damages in excess of $15,000,000 were requested.

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[4] That claim is contained in paragraphs 136–140 of the amended complaint (Pet. E5–E6). The factual allegations on which the charged violations are based are contained in paragraphs 46–64, 68, 69, 71, 114–117 of the amended complaint, which are realleged but not set forth in the ninth claim.

The Boeing counterclaims sought recovery on installment promissory notes in the amount of $5,017,589.46, given by TAL and guaranteed by TCC; and a small additional indebtedness for spare parts, for a down payment on a piston aircraft, and for services rendered by Boeing to TAL. Boeing alleged that TAL had been adjudicated a bankrupt; that Boeing's claim against TAL in that proceeding had been allowed in full; and that Boeing had filed and proved its claim against TCC (Pet. F1–F2).

The issues raised by the reply primarily involve the amount due on the notes. Petitioners did not deny the allegation that TAL had executed, and that TCC had guaranteed, the promissory notes in favor of Boeing for good and valuable consideration and they admitted that "some amount together with interest is due Boeing" on those notes (Pet. G1). The reply denied the additional indebtedness of $46,824.12, and that Boeing's claim in the bankruptcy proceedings had been fully allowed. It contained no affirmative defenses and in no way referred to the charges in the fifth and ninth claims by way of defense to the Boeing counterclaims.

The contrast between the antitrust and tort issues raised by the fifth and ninth claims of the amended complaint and the routine commercial issues framed by the counterclaim and reply is manifest. The district court's ruling that the latter were not "directed to [the] issue[s]" (Rule 38 (b)) in the complaint seems wholly unexceptionable.

(*b*) In granting the motion to strike, the district court relied on the Second Circuit's decision in *Gold-*

blatt v. *Inch,* 203 F. 2d 79, 80, which held that a counterclaim does not hold open the time for serving a demand for jury trial on an issue in a complaint when "the counterclaim relate[s] to a wholly distinct issue." See also, *Monolith Portland Midwest Co.* v. *Reconstruction Finance Corp.,* 240 F. 2d 444 (C.A. 9), certiorari denied, 354 U.S. 921; *Binger* v. *Unger,* 7 F.R.D. 121 (S.D.N.Y.). Petitioners' essential contention, for which no cases are cited, appears to be that the filing of a compulsory counterclaim, as a matter of law, extends the time for serving a jury demand covering any and all issues in the case (Pet. 6–8).[5] This argument, we believe, is without merit.

The plain wording of Rule 38(b) compels the conclusion that the critical fact, for purposes of measuring the ten-day period, is the similarity of the "issue[s]" in the complaint and "the last pleading." To be sure, there is a line of authority which suggests that a counterclaim is not a further pleading for purposes of applying Rule 38(b). Those cases, criticized by Professor Moore (5 Moore's *Federal Practice* 314–315), indicate that a counterclaim and reply do not extend the original suitor's time for a jury demand even when they are directed to the same issues framed by the complaint. That, however, was not the view

[5] Rule 13(a) of the Federal Rules of Civil Procedure provides that what would otherwise be a compulsory counterclaim need not be asserted if "at the time the action was commenced the claim was the subject of another pending action" (Pet. A1). The claims contained in Boeing's counterclaims in this action had previously been asserted in the bankruptcy proceedings (Pet. 8).

adopted by Judge Cooper. He agreed that when there is similarity between the issues posed by the counterclaim and those involved in the complaint "a jury demand, timely as to the former but not the latter, will extend to all the issues in the case" (Pet. B3). Since he has followed the less restrictive line of authority, petitioners can point to no conflict on the point relevant to the disposition of this case.[6]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

ARCHIBALD COX,
Solicitor General.

RALPH S. SPRITZER,
Assistant to the Solicitor General.

FEBRUARY 1965.

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[6] We do not read Professor Moore's discussion to say that the time for a jury demand is extended by the Rule when a counterclaim raises wholly dissimilar issues. The cases he cites with approval (*op. cit.*, p. 314 *et seq.*) are entirely consistent with the result reached in the instant case, and we know of no case which holds that a judge is bound to grant relief from the time limitation in circumstances where the cause of action stated in the counterclaim presents discrete issues.

Petitioners' reliance on *Beacon Theatres, Inc.* v. *Westover*, 359 U.S. 500, and *Dairy Queen, Inc.* v. *Wood*, 369 U.S. 469 (Pet. 10, 11), is wholly misplaced. Those cases involved the right to jury trial where legal and equitable issues are to be tried under the unified procedure of the Civil Rules. Nothing comparable is involved in the present case. Here, petitioners concededly could have obtained a jury trial as to all issues in the case by a timely demand therefor. By the same token, there can be no basis for a suggestion that the courts below have departed from the strictures of the Seventh Amendment.

U.S. GOVERNMENT PRINTING OFFICE: 1965